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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

File: EAC 02 102 51314 Office: VERMONT SERVICE CENTER Date: JAN 07 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a stone veneer and facings company. It seeks to employ the beneficiary permanently in the United States as a stone applicator. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a letter and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on April 11, 2001. The proffered wage as stated on the Form ETA 750 is $15 per hour, which equals $31,200 per year.

With the petition, counsel submitted the 2000 Form 1040 joint income tax return of the petitioner's owner and the owner's

spouse. The Schedule C, Profit or Loss from Business (Sole Proprietorship) filed with that return shows that the petitioner had a net profit of $34,125 during that year. The petitioner's owner and owner's spouse declared an adjusted gross income of $25,086 during that year, which included the petitioner's profit offset by various deductions.

The priority date of the petition, however, is April 11, 2001. Therefore, information pertinent to the finances of the petitioner and the petitioner's owner during 2000 are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on March 11, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested an itemized list of all of the expenses of the petitioner's owner's household and a copy of the petitioner's owner's 2001 income tax return.

In response, counsel submitted a copy of the 2001 Form 1040 joint income tax return of the petitioner's owner and the owner's spouse. The corresponding Schedule C, Profit or Loss from Business (Sole Proprietorship) was not included with that return. Line 12 of the Form 1040, however, indicates that the petitioner's net profit during that year was $65,904. The tax return also indicates that the petitioner's owner and owner's spouse declared an adjusted gross income of $53,465 during that year, including all of the petitioner's profit, offset by various deductions. Counsel did not provide the requested itemized list of the petitioner's owner's household expenses.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 27, 2002, denied the petition. The director noted that the petitioner's adjusted gross income of $53,465, less the proffered wage of $31,200, would leave only $22,165 to support the petitioner's owner's household. The director expressed doubt that the petitioner's owner is able to maintain his household on that amount.

On appeal, counsel provided the missing 2001 Schedule C, which confirms that the petitioner's net profit during that year was $65,904.

Counsel asserts that CIS erred in finding that the petitioner's profit during 2001 was $53,465 when line 12 of the Form 1040 submitted showed it to be $65,904. Counsel implied that the petitioner's profit, less the proffered wage, equals $34,809, an

amount which counsel asserted was sufficient to support the petitioner's household.

In fact, the director found that the petitioner's owner's adjusted gross income was $53,465, and did not find that to be the amount of the petitioner's profit. Further, counsel's arithmetic is incorrect. The flaw is unimportant; however, as the calculation urged by counsel is also inappropriate.

The petitioner is a sole proprietorship. The petitioner's owner is obliged to pay the petitioner's debts and obligations from his own income and assets. Although the petitioner's profit during 2001 was $65,904, the petitioner's owner is obliged to show that he was able to pay the proffered wage out of his adjusted gross income, the amount left after all appropriate deductions. The petitioner's owner is also obliged to show that the amount remaining after the proffered wage is subtracted from his adjusted gross income is sufficient to support his family, or that he has other resources and need not rely upon that income.

The proffered wage in this case is $31,200. The priority date is April 11, 2001. During 2001, the petitioner is not obliged to show the ability to pay the entire proffered wage, but only that portion which would have been due if the petitioner had been able to hire the beneficiary on the priority date. On the priority date, 100 days of that 365-day year had elapsed. The petitioner is only obliged to show the ability to pay the proffered wage during the remaining 265 days of that year. The proffered wage times 265/365th equals $22,605.05. The petitioner's owner's adjusted gross income of $53,465, minus $22,605.05, leaves a difference of $30,812.95 upon which the petitioner's owner would have had to support his household.

Counsel correctly observes that the amount that would have remained after paying the proffered wage greatly exceeds the poverty guidelines for 2001. The $30,812.95 may also have been sufficient to support the petitioner's owner's household. On March 11, 2002, in order to determine whether the amount remaining would be sufficient for that purpose, the director requested an itemized list of all of the expenses of the petitioner's owner's household. Counsel still has not provided that budget. This office is unable to determine whether the petitioner was able to pay the proffered wage and still leave the petitioner's owner funds sufficient to support his household.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.